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IN THE

Supreme Court of the United States

October Term, 1954.

No. 317.

SUPERINTENDENT FIVE CIVILIZED TRIBES, FOR SAMUEL FOX, Claim No. 1263, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF FOR THE PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 817.

SUPERINTENDENT FIVE CIVILIZED TRIBES, FOR SANDY FOX, CREEK NO. 1263, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF FOR THE PETITIONER.

OPINION BELOW.

The opinion of the United States Board of Tax Appeals (R. 11-18) is reported in 29 B. T. A. 635. The opinions of the Circuit Court of Appeals (R. 23-32) are reported in 75 F. (2d) 183.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 9, 1935 (R. 32). The petition for a writ of certiorari was filed March 26, 1935, and the writ was granted April 15, 1935 (R. 33). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Petitioner is a restricted, full-blood member of the Five Civilized Tribes. His property, both real and personal, is restricted and held in trust by the Secretary of the Interior. His "restricted funds" (income from his allotment) by direction of the Secretary of the Interior is invested by the Superintendent of the Five Civilized Tribes and the income from such investments is likewise received and held in trust as part of petitioner's "restricted funds".

The question is whether the income from these investments—"reinvested income"—is subject to a Federal Income Tax.

STATUTES AND REGULATIONS INVOLVED.

The pertinent parts of the Revenue Act involved will be found in Appendix A, *infra*, pp. 18-20. The pertinent statutes relating to taxation of members of the Five Civilized Tribes will be found in Appendix B, *infra*, pp. 21-27.

STATEMENT.

The facts in the case were stipulated (R. 9-10), and may be summarized as follows:

Sandy Fox is a full-blood, restricted Creek Indian, whose property both real and personal is under the supervision and control of the Secretary of the Interior and the Superintendent of the Five Civilized Tribes. The income from his allotment is received and held in trust by the said Superin-

tendent and invested by him under the direction of the Secretary of the Interior. The income interest from such investments[1] is likewise received and held in trust as part of Fox's restricted funds and property. (R. 9-10).

For the calendar year 1929 the Superintendent filed for Sandy Fox an income tax return and paid a tax of $102.59 from the restricted funds in his possession. Reported in this return for 1929 was an item of income in the sum of $7,797.42 received by said Superintendent as interest from the investment of petitioner's restricted funds. The return also included an item of $8,351.75 received by the said Superintendent as interest on Liberty Bonds held by him as part of Fox's restricted funds. Both of these items of income, in turn, became a part of Sandy Fox's restricted funds (R. 10).

During the year 1929, the Respondent under authority of 34 Ops. A. G. 275, published as Treasury Decision 3570, Cumulative Bulletin III-I, p. 85, refunded to said Superintendent for Fox, taxes, erroneously paid by the Superintendent on the income from Fox's allotment, with interest as provided by law:

Year	Tax	Interest
1914.....	$95.43	$79.15
1915.....	858.24	637.60
1916.....	3,396.31	2,400.75
Total	$4,349.98	$3,117.50

This interest in the sum of $3,117.50 is also a part of Sandy Fox's restricted funds and was not included in his tax return for 1929. The Respondent, however, increased the income reported on the return by this sum and determined a deficiency of $167.00 (R. 10).

[1] By the Act of May 25, 1918, 40 Stat. 592, sec. 28, *infra*, p. 26, the funds of Sandy Fox are required to be deposited in the banks of Oklahoma or in the United States Treasury and may be secured by the deposit of United States bonds.

In a review before the Board of Tax Appeals petitioner resisted the deficiency thus asserted and sought a recovery of the taxes previously paid on the theory that he was not subject to the federal income tax laws in respect to the income in question. It was urged that *Blackbird* v. *Commissioner* (C. C. A. 10), 38 F. (2d) 976, reversing 14 B. T. A. 1247, authoritatively adjudicated the question involved; that the decision in the Blackbird case is consonant with a series of Attorney General Opinions beginning with 34 Ops. A. G. 275, and that the Solicitor General did not seek a review of that decision by this Court. The Board's attention was also directed to the hundreds of cases wherein it entered orders of "no deficiency" in cases similar to that of Mary Blackbird. However, the Board of Tax Appeals denied petitioner's contention 29 B. T. A. 635 (R. 11-18), and approved the deficiency asserted by the Respondent on authority of its earlier decision in *Snell* v. *Commissioner*, 10 B. T. A. 1081.

The Circuit Court of Appeals, by a divided court, (R. 23-32) affirmed the order of the Board of Tax Appeals and by so doing in effect overruled the decision in *Blackbird* v. *Commissioner*, *supra*.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that Congress intended to impose an income tax on the income received and held in trust by the Superintendent of the Five Civilized Tribes, when the income arises from the investment by him, subject to the direction to the Secretary of the Interior, of a restricted, full-blood Indian's restricted property.

2. In holding that its earlier decision in *Blackbird* v. *Commissioner*, 38 F. (2d) 976 did not decide the question presented.

3. In affirming the order of the United States Board of Tax Appeals.

SUMMARY OF ARGUMENT.

This case relates to the taxability of income received and held in trust by the Superintendent of the Five Civilized Tribes. The income arises from the investment by him, subject to the direction of the Secretary of the Interior, of a restricted Indian's restricted funds.

In a series of opinions of the Attorney General, beginning with 34 Ops. A. G. 275, it has been held that income from allotments, such as Sandy Fox's, was not subject to federal taxation; that the federal income tax statutes do not apply to this class of Indians; that inalienability and nontaxability go hand in hand; and that it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian. These same views, in substance, were also enunciated by the Court below in holding nontaxable, the income of a restricted Osage Indian, *Blackbird* v. *Commissioner*, 38 F. (2d) 976.

Restrictions applicable to the property of the members of the Five Civilized Tribes is governed, primarily, by the Act of May 27, 1908 (35 Stat. 312). Broadly stated by section 4 of that Act and conditioned upon the removal of restrictions, the lands and the income therefrom become subject to taxation, state and federal. This has been the holding of the Court below in two cases, viz., *Bagby* v. *United States*, 60 F. (2d) 80, and *Pitman* v. *Commissioner*, 64 F. (2d) 740.

In the instant case restrictions have not been removed as to Sandy Fox's property. To the contrary it is administered by the Superintendent of the Five Civilized Tribes, by direction of the Secretary of the Interior. This trusteeship was created by Acts of Congress dealing specially with the affairs of the members of the Five Civilized Tribes. The income from the trust, upon which this controverted tax has been asserted, arises as a necessary incident to the proper discharge of the duty assumed by Congress. Under these circumstance we feel the Court below erred in hold-

ing the income of this trust was subject to federal taxation by virtue of the general taxing provisions of the Revenue Act of 1928. The correct view is expressed in the opinions of the Attorney General; in the dissenting opinion of Judge Lewis in this case; and in the decision of the Court below in *Blackbird* v. *Commissioner, supra.*

ARGUMENT.

Sandy Fox is a full-blood, restricted Creek Indian. All his property, both real and personal, is restricted and is held in trust by the Federal Government. By direction of the Secretary of the Interior his restricted trust funds are invested under Government supervision by the Superintendent of the Five Civilized Tribes, and the income from these investments is likewise received and held in trust by the said Superintendent, subject to reinvestment or other expenditure by the Federal Government for the benefit of Sandy Fox.

I.

The status of petitioner's property is governed by the Act of May 27, 1908, 35 Stat. 312, and as his property has not been made taxable by that act or any other act of Congress, it remains nontaxable.

Due to conditions at the time and since the Federal Government was established, its relations with the Indians have been of a complex nature, including the dealings of our Government with the Muscogee or Creek Tribe of Indians of which Sandy Fox is a member. By agreement and force this Tribe was induced to abandon its home in the East and move to its new home in Indian Territory—title to the lands thus acquired being vested in the Tribe with a reversionary interest retained by the United States.

By the act of June 28, 1898, 30 Stat. 495 (Curtis Act) and the Act of March 1, 1901, 31 Stat. 861, (Original Creek

Agreement), allotments in severalty were made of this tribal property. Restrictions on alienation were imposed on all the lands of allottees for a period of five years, but as to non-Indian allottees restrictions were removed on the surplus lands immediately upon the enactment of the Act of April 21, 1904, 33 Stat. 189. As to full-blood Indians alone restrictions were extended until April 26, 1931,[2] by the Act of April 26, 1906. This Act also provided for the removal of restrictions on all inherited property of heirs of less than full-blood.

The Act of May 27, 1908 (35 Stat. 312), superseded all prior legislation affecting restrictions upon the alienation of allotted lands of members of the Five Civilized Tribes. It set up its own complete plans as to the removal of restrictions and further provided that upon the removal of restrictions the property became subject to taxation. By section 1 thereof restrictions were removed on all lands of allottees of less than half-blood and on the surplus lands of all allottees of more than half but less than three-quarters blood. And by section 9[3] restrictions on an allottee's property were removed by his death, but as to the interest inherited by full-blood heirs the restrictions were only relaxed.

Thus, it will be seen that Congress, from time to time, has maintained the restrictions on the property of full-blood allottees, relaxing to a certain extent the restrictions on inherited property. Restrictions have also been maintained on the property of those of three-quarters but less than full-blood; except as to inherited property, restrictions on which have been entirely removed. As to all other allottees, beginning first with non-Indian allottees, restrictions have been entirely removed, except as to the homesteads of those of more than one-half but less than three-quarters Indian blood. As the quantum of Indian blood diminishes,

[2] Now extended to April 26, 1956, by the Act of May 10, 1928, 45 Stat. 495, *infra*, p. 26.

[3] *Parker* v. *Richard*, 250 U. S. 235, 238. See also Act of April 12, 1926, 44 Stat. 239, *infra*, p. 26.

so has the reason for the restrictions. In addition, the Secretary of the Interior may remove, wholly or in part, the restrictions not otherwise removed by statute. As stated by this Court in *Fink* v. *County Commissioners*, 248 U. S. 399, 403, the purpose of the Act of May 27, 1908, *supra*, in removing restrictions on property,

> "was to give to the Indian all of the attributes of ownership, to give him a mastery of his property equal to that of other owners of property, and nothing more, and this consummated the new policy of Congress."

This Court also reviewed the policy of Congress respecting the taxation of its Indian wards in *Choteau* v. *Burnet*, 283 U. S. 691. In sustaining a tax imposed upon the income of an Osage Indian, whose property was unrestricted by virtue of the Indian having received a certificate of competency under the Act of June 28, 1906 (34 Stat. 539), it was there said at page 694:

> "* * * the plan of the government has been gradually to emancipate the Indian from his former status as a ward; to prepare him for complete independence by education and the gradual release of his property to his own individual management. This plan has included imposing upon him both the responsibilities and the privilege of the owner of property, including the duty to pay taxes."

But in the present case, Sandy Fox does not possess the responsibilities and the privilege of a property owner. As to him emancipation has not begun. His property, both real and personal, is restricted and under the supervision and control of the Secretary of the Interior. Respecting his property, we submit, the proper rule of taxation applicable is that stated by Judge Lewis in his dissenting opinion (R. 31).

> "It may also be conceded that Congress may confer on the Secretary of the Interior, or other officials, power

> to remove from the lands of an Indian exemption from taxation, and when so removed from such lands or other property it becomes subject to taxation by state and nation. Action removing the exemption by either method expresses a clear intention by Congress to render the Indian's property subject to taxation. There could be no other intention."

As to these wards of the Federal Government inalienability and non-taxability are natural concomitants, otherwise involuntary sales of property to satisfy tax obligations could be effected. It was upon the removal of restrictions alone (unless a right of non-taxability existed by treaty or contract)[4] that Congress subjected an Indian's lands to any form of taxation and this construction is specifically enacted as section 4 of the Act of May 27, 1908, *supra*.[5]

Here, petitioner's property is restricted and has not been made subject to taxation either by section 4 of the Act of May 27, 1908, *supra*, or by any other Act of Congress. It therefore remains non-taxable.

II.

The Revenue Act of 1928 being a general Act of Congress does not apply to petitioner. As to him a tax levied by the Federal Government is inconsistent with its policy toward him as protector and conservator.

This Court in the case of *Elk* v. *Wilkins*, 112 U. S. 94, 100, held:

> "General Acts of Congress do not apply to Indians unless so expressed as to clearly manifest an intention to include them."

To the same effect are the decisions of this Court in *Ex parte Crow Dog*, 109 U. S. 556, 570, and *United States* v. *Quiver*, 241 U. S. 602, 606.

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[4] *Choate* v. *Trapp*, 224 U. S. 665, 675.
[5] *Shaw* v. *Oil Corporation*, 276 U. S. 575, 581.

The Revenue Act of 1928[6] is a general Act of Congress and the income involved results from the investment by a federal officer of a restricted Indian's restricted funds in his possession—a duty essential to the proper discharge of his trusteeship. Under such conditions the question presented is essentially the same as that under review in 34 Ops. A. G. at page 279. There the asking of several questions was to answer them consistent with the position taken by the petitioner here.

> "While these funds (incomes) are in the hands of the Federal Government, kept in the United States Treasury and not paid out or pledged except under the consent of the Government, a State has no right to tax them. If, a State can not tax them, the question arises, is it proper or legal for the Federal Government to tax them? Is it consistent for it to guard this income from the State taxing power and surrender it to Congressional authority? Would such procedure be consistent with its policy toward the Indian as protector and conservator?"

In making refunds under authority of this opinion of the Attorney General, there arose the question as to whether the Government should invoke the provisions of the Revenue laws requiring the filing of timely claims for refund. In answering this question in the negative, the Attorney General further stated, 34 Ops. A. G. 302, 305:

> "Moreover, in as much as *the income tax statutes do not apply to the class of Indians under discussion,* I

[6] By a ruling of the Bureau of Internal Revenue, a tax return was required by the Superintendent of the Five Civilized Tribes, for Sandy Fox; IT: 1366, C. B. I-I, Jan.-June, 1922, page 242, which provides in part:

> "In such a case the return should be made by the office of Indian Affairs, by its local superintendent or agent on behalf of the *Government as trustee* and the taxes assessed upon such return should be paid by the superintendent or agent who makes the return." (Italics ours.)

In the event the income in question is held taxable this ruling is applicable to the year 1929 under section 143 (a) of the Revenue Act of 1928, c. 852, 45 Stat. 791, which among other things provides that every fiduciary shall make a tax return for all individuals for whom he acts when the income is in excess of the credits properly allowable.

see no reason why the limitations clauses therein contained relative to claims for refund or abatements should be invoked against them." (Italics supplied.)

and in 34 Ops. A. G. 439,[1] 445, it was said:

> "In order to make this restriction against alienation properly effective, it would seem that *inalienability and nontaxability should go hand in hand,* at least until Congress clearly provides otherwise. At any rate, I am unable, by implication, to impute to Congress under the broad language of our Internal Revenue Acts an intent to impose a tax for the benefit of the Federal Government on income derived from the restricted property of these wards of the nation; property the management and control of which rests largely in the hands of Officers of the Government charged by law with the responsibility and duty of protecting the interests and welfare of these dependent people. *In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian.*" (Italics supplied.)

In holding that the income derived from the restricted lands of the Kaw Indians was not subject to the Federal Income Tax laws, the Attorney General (35 Ops. A. G. 1, 5) among other things said:

> "Whatever right the Act of May 27, 1924, may have conferred upon the State of Oklahoma to tax the mineral production of the lands of the Kaws, it cannot be taken as indicating an intention on the part of Congress to subject the income derived from these lands to Federal taxation. Such a wide departure from the prior legislative policy should not be assumed from doubtful implication, but should be recognized as existing only upon the enactment of legislation expressly so providing."

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[1] This opinion of the Attorney General was published as Treasury Decision 3754, Cumulative Bulletin, IV-2, July-Dec. 1925, page 37. It is contrary to and superseded earlier rulings of the Bureau of Internal Revenue, namely I. T. 1730, Cumulative Bulletin II-2, July-Dec. 1923, p. 55 and L. O. 1098, Cumulative Bulletin I-1, Jan.-June 1922, page 64.

Clearly the opinions of the Attorney General are in harmony with the opinion of this Court in *Elk* v. *Wilkins, supra;* with the decision of the Court below in *Blackbird* v. *Commissioner, supra;* and with the position of petitioner. Further, none of the opinions of the Attorney General have been revoked or rescinded. It must be assumed that subsequent enactments by Congress of the same language in matters of Internal Revenue Taxation were with the presumed knowledge and ratification of the construction placed upon such language by the Attorney General.

III.

The opinion of the court below disregards the doctrine of stare decisis by overruling its earlier decision in Blackbird v. Commissioner, 38 F. (2d) 976, and the decisions relied upon by the court to support its conclusion are not in point.

As a result of the series of Attorney General opinions hereinbefore referred to, there was refunded to the various members of the tribes of Indians affected taxes previously paid. These opinions, however, were not applied by the Respondent to the income of restricted Osage Indians,* and as to them, it was necessary to litigate the question of federal taxation before the Circuit Court of Appeals for the Tenth Circuit. The case selected was *Blackbird* v. *Commissioner*, 38 F. (2d) 976, and the Court in reversing 14 B. T. A. 1247, stated at page 978:

> "She and the other petitioners contend that they are not only not liable for the amounts named under the deficiency orders but that they are not subject to the income tax statute. As to Mary Blackbird, we are disposed to yield our assent to the soundness of the contention. She is a restricted full-blood Osage. Her

* The ruling of the Bureau of Internal Revenue holding restricted Osage Indians taxable is published as I. T. 1834, Cumulative Bulletin II-2, July-Dec. 1923, page 62. It was published prior to the opinions of the Attorney General cited herein.

> property is under the supervising control of the United States. She is its ward, and we cannot agree that because the income statute, Act of 1918 (40 Stat. 1057), and Act of 1921 (42 Stat. 227), subjects 'the net income of every individual' to the tax, this is alone sufficient to make the Acts applicable to her."

The Solicitor General did not petition this Court for a writ of certiorari in the "Blackbird" case and as a result all taxes paid by the restricted members of the Osage Tribe of Indians were refunded.

In the instant case the majority of the Court below express the view that the question for decision was not governed by the principle enunciated in the Blackbird case. With this we disagree, believing that Judge Lewis in his dissenting opinion (R. 32) correctly states:

> "Not only does the majority opinion overrule the Mary Blackbird case, it also disregards the wholesome doctrine of *stare decisis*."

The same conclusion is also expressed by the Solicitor General at page 2 of his Memorandum, wherein the petition for a writ of certiorari in this case was not opposed.

It is clear that the majority of the Court below, in holding that the income received by the Superintendent of the Five Civilized Tribes, for Sandy Fox was taxable, did not consider as a unit the status of Fox respecting the income involved together with the relationship that exists between him and the Federal Government. To the contrary the Court supports its conclusion on three unrelated premises (R. 28) none of which are pertinent to the issue presented. They are:

1. Congress did not intend to exempt Indians as such from Federal taxation.

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[9] The rule laid down in the Blackbird case was also applied in *United States* v. *Homeratha*, 40 F. (2d) 305, 306; appeal dismissed by stipulation 49 F. (2d) 1086.

2. Congress did not intend to exempt restricted property as such from state taxes.

3. Property acquired for investment is not a federal instrumentality in the sense the original allotment is.

The first premise was said by the Court below to be supported by the decision of this Court in *Choteau* v. *Burnet*, 283 U. S. 691. In that case Choteau, an Osage Indian had received a certificate of competency under the Act of June 28, 1906 (34 Stat. 539). The income in question was received by him and was clearly beyond the control of the United States. His right to receive and use it was absolute, this Court stating at page 696 of 283 U. S.:

> "The claim that with respect to this income the petitioner was restricted, and therefore exempt from the tax laid by sections 210 and 211 (a) [40 Stat. 1062] must fail."

The second premise was said by the Court below to be supported by *United States* v. *Gray*, 284 Fed. 103; *United States* v. *Ransom*, 284 Fed. 108; *United States* v. *Mummert*, 15 F. (2d) 926; and by *Shaw* v. *Oil Corporation*, 276 U. S. 575. In each of these cases taxable lands within a state were purchased by the Secretary of the Interior with restricted funds of an Indian. To exempt these taxable lands from state taxation merely because the Secretary of the Interior required that the deed of conveyance should provide for inalienability without his consent for a period of years, would, as this Court pointed out in *Shaw* v. *Oil Corporation* at page 581 of 276 U. S.:

> "present the curious paradox that the Secretary by a mere conveyancer's restriction, permitted by Congress, had rendered the land free from taxation * * *"

The third premise was said by the Court below to be also supported by *Shaw* v. *Oil Corporation, supra*. In that case

the Oil Corporation was the lessee of taxable lands purchased by the Secretary of the Interior with accumulated royalties derived from the restricted lands of a full-blood Indian; and the State of Oklahoma asserted a gross production tax upon the corporation. In upholding this tax this Court held the interest of the lessee in the lands was not such a federal instrumentality as to exempt the corporation from the tax.

From these irrelevant premises we submit that the majority opinion below erroneously concluded (R. 28):

> "While the question is not free from doubt, we are of the opinion that, as construed by the Supreme Court, the intent of Congress was to subject the income from investments of surplus funds, as well as the investments themselves, to taxation."

We feel none of the premises relied upon by the Court below are in point; first, the present case does not involve an Indian with the status respecting the income in question as that considered in *Choteau* v. *Burnet, supra*; second, it does not involve the right of the Secretary of the Interior by a conveyancer's restriction to exempt from state taxation land previously taxed by the state; and third, it does not involve the right of a state to tax a federal instrumentality.

Here, restrictions imposed by Federal law exist as to Sandy Fox and all his property, both real and personal. The question is whether the Revenue Act of 1928 imposes a Federal Income Tax upon the income received and held in trust by a Federal Officer from investments made by him of a restricted Indian's restricted funds in his possession. The answer to this question, we submit, is properly controlled by the expressions of the Court below in *Blackbird* v. *Commissioner*, at page 978 of 38 F. (2d):

> "We cannot agree that because the income statute, Act of 1918 (40 Stat. 1057), and the Act of 1921 (42 Stat.

227), subjects the net income of every individual to the tax, this is alone sufficient to make the Acts applicable to her."

The principle expressed above was also the basis of two later decisions of the Court below and each of those cases involved Federal Income Taxes asserted against members of the Five Civilized Tribes. In *Bagby* v. *United States*, 60 F. (2d) 80, affirming 53 F. (2d) 260; and in *Pitman* v. *Commissioner*, 64 F. (2d) 740, reversing in part 24 B. T. A. 244, taxes were held to be properly imposed not because general revenue acts applied to all Indians, but because the property producing the income had been made taxable by section 4 of the Act of May 27, 1908 (35 Stat. 312). In the *Bagby case*, *supra*, it was said at page 81 of 60 F. (2d):

> "If it clearly appears from said Act [Act of May 27, 1908] *and* the Revenue Act of 1918 (40 Stat. 1057) that Congress intended to subject her income to the tax the assessment was not erroneous and illegal." (Italics ours.)

And in the *Pitman case*, *supra*, at page 742 of 64 F. (2d):

> "On the removal of such restrictions, such lands and the income therefrom became subject to taxation under the provisions of Section 4 of such Act. [Act of May 27, 1908]
>
> * * * * * * * *
>
> "The homestead portion of the allotment, however, remained subject to the restrictions provided by Sec. 1, *supra*, until the death of Pitman, Jr., the original allottee. Upon his death it passed by inheritance to the petitioner, a full-blood Indian heir, and became subject to the qualified restrictions imposed by Sec. 9, *supra*, and remained exempt from taxation. *Parker v. Richard*, 250 U. S. 235, 238, 39 S. Ct. 442, 63 L. Ed. 954; *Marcy* v. *Board of Commissioners*, 45 Okla. 1, 144 P. 611; *United States* v. *Shock* (C. C. Okl.) 187 F. 870."

The doctrine so unequivocably expressed in the Bagby and Pitman cases, *supra*, should not be enlarged.

There is no legal warrant for the assumption made by the majority of the Court below that the general terms of the Revenue Act of 1928, contrary to the consistent views heretofore held by the Attorney General and the Courts, should supersede the specific legislation of Congress dealing with Indian affairs. Congress by special legislation has restricted the property and the income of Sandy Fox. If these restrictions and the concomitant tax exemptions are to be removed, it should be done by legislation directed to that purpose, and not by judicial construction without recourse to the Congress which alone has the right to change the National policy toward these wards of the Government.

CONCLUSION.

It is respectfully submitted that the decision of the Court below is erroneous and should be reversed.

THOMAS J. REILLY,
F. M. GOODWIN,
ARTHUR F. MULLEN,
GEORGE F. SHEA,
Attorneys for Petitioner.

April 23, 1935.

APPENDIX A.

REVENUE ACT AND REGULATIONS INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 11. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax * * *

SEC. 12. SURTAX ON INDIVIDUALS.

(a) Rates of surtax. There shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax * * *

SEC. 22. GROSS INCOME.

(a) General definition. "Gross Income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

SUPPLEMENT E—ESTATES AND TRUSTS

SEC. 161. IMPOSITION OF TAX.

(a) Application of tax. The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, * * *

* * * * *

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) Computation and payment. The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided

in section 166 (relating to revocable trusts) and Section 167 (relating to income for benefit of grantor). For return made by beneficiary, see Section 143.

SEC. 143. FIDUCIARY RETURNS.

(a) Requirement of return. Every fiduciary * * * shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof and the deductions and credits allowed under this title.

(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife;

* * * * * *

(4) Every estate or trust the net income of which for the taxable year is $1,500 or over; * * *

Treasury Regulation 74, promulgated under the Revenue Act of 1928:

Art. 741. Fiduciary returns. Every fiduciary, * * * must make a return of income—

(a) For the individual whose income is in his charge if the gross income of such individual is $5,000 or over, or if the net income of such individual is $1,500 or over if single or if married and not living with husband or wife, or if such individual is married and was living with husband or wife for the entire taxable year and the aggregate gross income of both husband and wife is $5,000 or over, or the aggregate net income of both husband and wife is $3,500 or over, or if such individual is married and was living with husband or wife for a period less than the entire taxable year and the aggregate gross income of both husband and wife is equal to, or in excess of, the credit allowed them by section 25 (e) (2), or

(b) For the estate or trust for which he acts if the net income of such estate or trust is $1,500 or over, or

if the gross income of the estate or trust is $5,000 or over, regardless of the amount of the net income, or if any beneficiary of such estate or trust is a non-resident alien.

The return in case (a) shall be on Form 1040 or 1040 A. In case (b) a return is required on Form 1040 with respect to any taxable net income of the estate or trust computed in accordance with Section 162 and a return on Form 1041 with respect to any income deducted under Section 162 (b) or (c). If a portion of the income of the estate or trust is retained by the fiduciary and the remainder is distributable or distributed to beneficiaries, both Forms 1040 and 1041 will be required. • • •

APPENDIX B.

Legislation Pertaining To The Five Civilized Tribes.

Act of March 3, 1893, c. 209, 27 Stat. 612, 645:

> SEC. 15. The consent of the United States is hereby given to the allotment of lands in severality not exceeding one hundred and sixty acres to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. * * * and upon the allotment of the lands held by said tribes respectively the reversionary interest of the United States therein shall be relinquished and shall cease.
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> SEC. 16. The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muscogee (or Creek) Nation; the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians * * * or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, * * *

Act of June 28, 1898, c. 517, 30 Stat. 495, 514:

> SEC. 30. That the agreement made by the Commission to the Five Civilized Tribes with the commission representing the Muscogee (or Creek) tribe of Indians on the twenty-seventh day of September, eighteen hundred and ninety-seven, as herein amended, is hereby ratified and confirmed * * *
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> 1. There shall be allotted out of the lands owned by the Muscogee or Creek Indians in the Indian Territory

to each citizen of said nation one hundred and sixty acres of land. * * *.

* * * * * * * * * *

5. The United States shall put each allottee in unrestricted possession of his allotment and remove therefrom all persons objectionable to the allottee.

* * * * * * * * * *

34. Neither the town lots nor the allotment of land of any citizen of the Muscogee or Creek Nation shall be subjected to any debt contracted by him prior to the date of his patent.

* * * * * * * * * *

Act of March 1, 1901, c. 676, 31 Stat. 861:

* * * That the agreement negotiated between the Commission to the Five Civilized Tribes and the Muscogee or Creek tribe of Indians at the city of Washington on the eighth day of March, nineteen hundred, as herein amended, is hereby accepted, ratified, and confirmed. * * *

* * * * * * * * * *

3. All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. * * *

* * * * * * * * * *

7. Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

Each citizen shall select from his allotment forty acres of lands as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: * * *

* * * * * * * * * *

23. * * * All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his deed. * * *

Act of June 30, 1902, c. 1323, 32 Stat. 500, 503:

* * * That the following supplemental agreement, submitted by certain commissioners of the Creek tribe of Indians, as herein amended, is hereby ratified and confirmed: * * *

* * * * * * * * * *

16. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

* * * * * * * * * *

20. This agreement is intended to modify and supplement the agreement ratified by said act of Congress approved March 1, 1901, and shall be held to repeal any provision in that agreement or in any prior agreement, treaty, or law in conflict herewith.

* * * * * * * * * *

Act of April 21, 1904, c. 1402, 33 Stat. 189, 204:

> • • • And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed • • •
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> • • • • • • • • • •

Act of April 26, 1906, c. 1876, 34 Stat. 137, 144:

> SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: • • • *Provided further*, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.
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> SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; • • • All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.
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> SEC. 29. That all Acts and parts of Acts inconsistent with the provisions of this Act, be and the same are hereby repealed.

Act of May 27, 1908, c. 199, 35 Stat. 312:

> • • • That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. • • •
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> SEC. 4. That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided*, That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts theretofore expressly permitted by law.

SEC. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: * * *

Act of May 25, 1918, c. 86, 40 Stat. 561, 592:

SEC. 28. * * * *And provided further*, That the foregoing shall not apply to the funds of the Five Civilized Tribes, or the Osage Tribe of Indians, in the State of Oklahoma, but the funds of such tribes and individual members thereof shall be deposited in the banks of Oklahoma or in the United States Treasury and may be secured by the deposit of United States bonds.

Act of April 12, 1926, c. 115, 44 Stat. 239, amending section 9 of the Act of May 27, 1908, to read as follows:

SEC. 9. The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator; * * *

Act of May 10, 1928, c. 517, 45 Stat. 495:

* * * That the restrictions against the alienation, lease, mortgage, or other incumbrance of the lands allotted to members of the Five Civilized Tribes in Oklahoma, enrolled as of one-half or more Indian blood, be, and they are hereby extended for an additional period of twenty-five years commencing on April 26, 1931: *Provided*, That the Secretary of the Interior shall have the authority to remove the restrictions, upon the applications of the Indian owners of the land, and may

remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.

* * * * * * * * *

SEC. 3. That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full blood Indian heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and belonging to the Indian owners of the land, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas, and other mineral production.

* * * * * * * * *

Act of January 27, 1933, c. 23, 47 Stat. 777:

* * * That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of the said Secretary until April 26, 1956, subject to expenditures in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, * * * *And provided further,* That all minerals including oil and gas, produced from said land so acquired shall be subject to all State and Federal taxes as provided in section 3 of the Act approved May 10, 1928 (45 Stat. L. 495).

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